IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

DAVID HARRIS
PLAINTIFF

vs. Docket No. 1:96cv74-D-B

COMMISSIONER OF SOCIAL
DEFENDANTS
SECURITY

MEMORANDUM OPINION

Presently before this court is a timely filed objection to the findings and recommendations of United States Magistrate Judge Eugene M. Bogen. Judge Bogen's report and recommendation found the Administrative Law Judge's (ALJ) denial of social security benefits to the plaintiff to be correct. Having considered the Magistrate Judge's report and recommendation, the defendant's objections thereto, the record as a whole, and the pertinent case and statutory law, the undersigned shall adopt the Magistrate Judge's report and recommendation and shall deny the petitioner's request for relief under 42 U.S.C. § 405(g).

FACTUAL AND PROCEDURAL BACKGROUND

David Harris was born on October 29, 1953, was educated through the twelfth grade, has had some vocational training, and has since been employed in various capacities including delivery driver, material handler, customer assistance person, railroad repair person, and garbage collector. He owns a house and has

lived there for six or seven years with his wife and children. His last employment ceased on August 14, 1992 as a result of back, leg, and hip pain; lower extremity and hand numbness as a result of a herniated disc; peptic ulcer disease; hypertension; and depression. Plaintiff's testimony provides that since leaving work he has needed medicine for pain but cannot afford it. He is unable to sit for any length of time without experiencing pain in his legs, back and hip. Due to numbness in his feet and hands, he is not able to stand for any length of time, nor is he able to kneel. He is no longer able to do his former work and cannot sleep all night. He has difficulty dressing himself and requires assistance out of the shower. He can no longer enjoy past hobbies, such as fishing, due to his physical condition. By and large, his day is comprised of naps, watching television, and moving about the house.

On June 21, 1993, plaintiff filed for social security benefits. At the time of filing the plaintiff was forty years old, weighed approximately 198 pounds, and stood six feet tall. The benefits sought were denied initially and also upon reconsideration. Plaintiff received a hearing before the ALJ on September 26, 1994. The ALJ's decision, dated April 26, 1995, denied the plaintiff social security benefits. The ALJ determined the plaintiff's impairments of peptic ulcer disease, hand numbness, and depression were not severe, and further found

the plaintiff's conditions of status post-laminectomy with back pain, lower extremity numbness and hip pain, and controlled hypertension were severe. Due to his impairments the ALJ determined the plaintiff could no longer perform his past relevant work, but ultimately found the plaintiff was capable of doing a number of sedentary jobs in the national economy. Considering the conditions of the plaintiff that were found to be severe impairments, the ALJ stipulated that the sedentary jobs available to the plaintiff were required to allow him the option of rotating between sitting and standing. The specific jobs actually named were a self-service booth cashier, ticket taker, and ticket seller.[1] The plaintiff appealed the findings of the ALJ, and on October 24, 1996, oral argument was heard by the Magistrate Judge in the above entitled action in Oxford pursuant to 28 U.S.C. § 636 (b)(4) and Local Rule M-5(c), at which plaintiff and defendant Commissioner were represented by their respective counsel.

DISCUSSION

In reviewing the decision of the Secretary, this court is limited to determining whether substantial evidence supports the finding of the ALJ when considering the record as a whole. See Martinez v. Chater, 64 F.3d 172, 173 (5th Cir. 1995); Randall v.

[1] The jobs articulated by the ALJ were taken from the vocational expert's opinion. The vocational expert testified at the hearing before the ALJ.

Sullivan 956 F.2d 105, 109 (5th Cir. 1992); Selders v. Sullivan, 914 F.2d 614, 617 (5th Cir. 1990); Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990). "Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Villa v. Sullivan, 895 F.2d 1019, 1021-22 (5th Cir. 1990) (internal quotations and citations omitted); Ripley v. Chater 67 F.3d 552, 555 (5th Cir. 1995); Martinez, 64 F.3d at 173; Randall, 956 F.2d at 109. Four elements are weighed when determining "whether there is substantial evidence of disability: (1) objective medical facts; (2) diagnoses and opinions of treating and examining physicians; (3) the claimant's subjective evidence of pain and disability; and (4) his age, education, and work history." Wren v. Sullivan, 925 F.2d 123, 126 (5th Cir. 1991); Martinez, 64 F.3d at 174. This court may not, however, "reweigh the evidence or substitute its judgment for that of the administrative fact finder." Cook v. Heckler, 750 F.2d 391, 392 (5th Cir. 1985); see Randall, 956 F.2d at 109. If substantial evidence is found, this court may only determine whether the ALJ applied the proper legal standards and conformed with the applicable statutes and regulations. Cook, 750 F.2d at 392-93; see Martinez, 64 F.3d at 173. This court recognizes it is not to act as a "rubber stamp" for the Secretary's decision or the magistrate judge's findings. Cook, 750 F.2d at 393. Therefore

"[w]e must scrutinize the record and take into account whatever fairly detracts from the substantiality of evidence supporting the Secretary's findings." Id.; see Randall, 956 F.2d at 109.

The plaintiff makes two arguments in support of his appeal. First, the plaintiff argues that the controlling legal standard as set forth in Stone v. Heckler was not followed in this case. Stone v. Heckler, 752 F.2d 1099, 1101 (5th Cir. 1985). Second, the plaintiff argues the ALJ did not give proper consideration to the testimony of the vocational expert, did not specify what work in the sedentary field the plaintiff was expected to perform, and did not properly address issues such as credibility and pain. The five-step process for evaluating whether a claimant is disabled, pursuant to 20 C.F.R. § 404.1520, is as follows:

> First, a claimant who a the time of his disability claim is engaged in substantial, gainful employment is not disabled. Second, the claimant is automatically denied benefits if the asserted impairment is not severe, without consideration of his age, education, or work experience. Third, if the asserted impairment is severe, the claimant is perforce disabled if his impairment meets or equals an impairment described in the Listings. Fourth, a claimant with a severe impairment that is not per se disabling is denied benefits if he is capable of doing past relevant work. Fifth, a claimant who cannot return to past relevant work is denied benefits if he can engage in work available in the national economy.

Lovelace v. Bowen, 813 F.2d 55, 58 (5th Cir. 1987) (footnotes omitted); see Martinez, 64 F.3d at 173-74; Wren, 925 F.2d at 125; Selders, 914 F.2d at 618. Analysis of the fifth step includes consideration of the claimant's residual functional capacity,

age, education, and work experience. see Selders 914 F.2d at 618; Lovelace, 813 F.2d at 58. A determination that a claimant is disabled or not disabled at any step in the inquiry ends the analysis. see Harrel v. Bowen, 862 F.2d 471, 475 (5th Cir. 1988); Lovelace, 813 F.2d at 58 n.15. It is clear from the record that the ALJ followed the five-step process. First, the ALJ found the plaintiff was not currently engaged in gainful employment. Second, without consideration to the plaintiff's age, education, or work experience the ALJ determined certain conditions of the claimant to be severe and certain others not, as previously addressed above. Third, those conditions found to be severe were not contained in the listings of the controlling regulation.[2] Fourth, the ALJ found the plaintiff could not perform past relevant work. Finally, although the plaintiff could not do past relevant work, the ALJ determined he could perform certain qualified sedentary work available in the national economy as identified by the vocational expert.

Addressing the plaintiff's first argument, the standard for whether an impairment is severe within the meaning as set forth in Stone v. Heckler is as follows: "[a]n impairment can be considered as not severe only if it is a slight abnormality [having] such minimal effect on the individual that it would not

[2] A listed condition renders the claimant per se disabled. 20 C.F.R. §§ 404.1520(d), 416.920(d), 404P app. 1 (1996).

be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience." Stone, 752 F.2d at 1101. It is clear from the record the ALJ determined several of the plaintiff's impairments to be severe, but as set forth above, the analysis does not end there. Proceeding to the third step in the process, the ALJ properly determined, and the plaintiff does not deny, his severe impairments were not listed as per se disabling as provided in the Social Security Act.[3] Finally, applying the fifth step and adopting the opinion of the vocational expert, the ALJ articulated specific sedentary work the plaintiff could still perform. With regard to the impairments not found to be severe by the ALJ, it is significant that the plaintiff has testified these impairments do not prevent him from working. Accordingly, applying the standard set forth in Stone, the ALJ was not erroneous in determining they were not severe because they did not "interfere with the [plaintiff's] ability to work." Id. The ALJ followed the process through the fifth step and ultimately determined, despite certain severe impairments, the plaintiff was capable of performing qualified sedentary work. The undersigned finds no error in this application and holds the proper standard was applied.

Turning to the plaintiff's second argument, the undersigned addresses the issues of whether the ALJ properly considered the

[3] Id.

testimony of the vocational expert, named specific jobs available to the plaintiff, and properly considered the credibility of the plaintiff's allegations of pain. It is uncontroverted the expert opined that taking all the plaintiffs allegations of impairment, limitation and severe pain as true, there would be no jobs available for the plaintiff to perform. However, the ALJ also posed three additional hypothetical situations to the vocational expert, based on identical facts, with only one variation; the level of pain. The first hypothetical assumed some pain, the second assumed moderate pain, and the third assumed severe pain. Thus, the expert rendered a total of four opinions. The first and fourth opinions assumed severe pain existed, and the expert concluded they would preclude the plaintiff from working. The second and third opinions assumed some and moderate pain respectively, and the expert concluded neither would preclude the plaintiff from doing certain sedentary work. Based on the second and third opinions, the vocational expert determined at least three particular job types were still available to the plaintiff, i.e., self service booth cashier, ticket taker, and ticket seller.[4] Based on the record, it is clear the ALJ properly "found

[4] The vocational expert considered the plaintiff's need for a sit/stand option and the level pain when rendering this opinion. (See Tr. at 163.) The total number of positions for the named job classifications were determined to be 4,500 in this state and 275,000 in the national economy. (See Tr. at 164.) In addition, the expert testified that the three named job classifications were examples, and that other similar jobs would

that [the plaintiff] could not perform the full range of sedentary work activity and expressly relied upon the vocational expert's identification of jobs as evidence of [the plaintiff's] ability to perform work in the national economy, despite [his] nonexertional limitations." Vaughan v. Shalala, 58 F.3d 129, 132 (5th Cir. 1995). Moreover, despite the plaintiff's argument to the contrary, the ALJ's articulation of three job types, based on the opinion of the expert, possessed sufficient specificity. Indeed, "[t]o insist . . . that the ALJ must consider not simply the existence of generic jobs such as cashier but their specific working conditions is incorrect. [This would come] close to arguing that the vocational expert must identify specific jobs open to a particular claimant, an exercise both futile, overwhelming, and unnecessary." Vaughan, 58 F.3d at 132.

The Fifth Circuit has addressed the special nature of applicants requiring a sit/stand option. Scott v. Shalala, 30 F.3d 33, 34-35 (5th Cir. 1994). In Scott, the plaintiff required the same sit/stand option as the plaintiff in this case. Scott, 30 F.3d at 34. The court held this condition prevented a rigid application of the medical-vocation guidelines to determine job types available to the plaintiff. Id. As a result, the court determined the ALJ must rely on the testimony of the vocational expert in order to properly evaluate the job types

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also be available. Id.

available to the plaintiff. Id. The court in Scott concluded the ALJ erred by relying on the medical-vocational guidelines and making only a "passing reference" to the expert's testimony. Id. at 35 n.3. This facts in this case are distinguished from those in Scott. Here, the record shows the ALJ frequently considered the expert's testimony. Also, the ALJ did not determine the job types available to the plaintiff based on the guidelines, but on the testimony of the expert. Therefore, based on the foregoing, it is clear the record as a whole demonstrates the ALJ gave proper consideration to the expert's testimony, and properly articulated specific jobs available to the plaintiff in the national economy. As such, this court finds substantial evidence to support the ruling of the ALJ.

Turning to the credibility of the plaintiff, this court recognizes it is within the discretion of the ALJ to evaluate the subjective complaints of pain by the plaintiff. see Wren, 925 F.2d at 128; Harrel, 862 F.2d at 480; Scott, 30 F.3d at 35 n.2. The determinations of the ALJ are "entitled to considerable deference." Wren, 925 F.2d at 128; see Scott, 30 F.3d at 35 n.2; James v. Bowen, 793 F.2d 702, 706 (5th Cir. 1986). In order to be disabling, "pain must be constant, unremitting and wholly unresponsive to therapeutic treatment." Harrel, 862 F.2d at 480; see Wren, 925 F.2d 128; Haywood v. Sullivan, 888 F.2d 1463, 1470 (5th Cir. 1989). Here, the ALJ specifically found "the

claimant's subjective complaints [were] not credible in establishing pain of a 'disabling' nature . . . . [and that] [t]he record simply [did] not reveal any frequent, severely intense pain of such a 'disabling' nature." (Tr. at 13.) In reaching this conclusion, the ALJ gave due consideration to the plaintiff's medical conditions, treatments, hospitalizations, and medications. (See Tr. at 13.) The ALJ "considered the interrelation of the objective medical and psychological findings, the diagnoses and notes of examining physicians, and the [plaintiff's] own subjective complaints of discomfort." Id. In addition, the ALJ specifically articulated why he determined the plaintiff's subjective complaints were not credible. Id. It is clear from the record as a whole the ALJ thoroughly considered all relevant factors regarding the plaintiff's allegations of pain, as such the undersigned gives deference to his determination. Therefore, this court finds the substantial evidence in the record viewed as a whole supports the ALJ's conclusions. Accordingly, this court is of the opinion the Magistrate Judge's Report and Recommendations should be approved, and the petitioner's request for relief under § 405 (g) is hereby denied.

A separate order in accordance with this opinion shall issue this day.

THIS _____ day of April, 1997.

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United States District Judge

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COMMISSIONER OF SOCIAL
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ORDER DENYING PETITIONER'S REQUESTED RELIEF
UNDER 42 U.S.C. § 405 (g)

Pursuant to a memorandum opinion issued this day, it is hereby **ORDERED** that:

1) the petitioner's objection to Magistrate Judge Eugene M. Bogen's report and recommendations is hereby **OVERRULED**.

2) the report and recommendation of Magistrate Judge Eugene M. Bogen is hereby **APPROVED** and adopted as the opinion of this court.

3) the petitioner's request for relief under § 405 (g) is hereby **DENIED**.

All memoranda, affidavits, exhibits and other matters considered by the court in ruling on these motions are hereby incorporated and made a part of the record.

ORDERED this _____ day of April, 1997.

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United States District Judge